

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

SCOTT TRAUDT,

Plaintiff,

vs.

DAIMLER CHRYSLER MOTORS
COMPANY LLC,
PERFORMANCE MARKETING, INC.,
DAVID CICOTTE,
MECHANICS JOHN DOES 1-4.

Defendants

Civil Action File No. 1:04-CV-53

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
2004 AUG 28 A 10:28
CLERK
BY
DEPUTY CLERK

MOTION TO DISMISS COMPLAINT AGAINST PERFORMANCE MARKETING,
INC., AND DAVID CICOTTE

NOW COMES Performance Marketing, Inc. and David Cicotte, defendants in the above entitled action, by and through their attorneys, Miller Fagnant & Behrens, P.C., and move to dismiss the complaint against them for lack of jurisdiction. In support of this motion, defendants submit the following memorandum of law.

MEMORANDUM OF LAW

The court having previously dismissed the RICO claims against the moving defendants, the court lacks diversity jurisdiction over Performance Marketing, Inc. [Performance] and David Cicotte for any remaining tort claims set forth in the First Amended Complaint because plaintiff has failed to establish that he and defendants are all citizens of different states. Thus there is no diversity of citizenship as required by 28 USC 1332(a) because the plaintiff may not share citizenship with any defendant. See *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68, 117 S.Ct. 467, 472 (U.S.Ky.,1996)

GRANTED absent objection. Plaintiff's remaining state law claims are DISMISSED without prejudice.
Dated at Brattleboro, Vermont this 20th day of September, 2004.
J. Garvan Murtha, U.S. District Judge

MILLER FAIGNANT
& BEHRENS P.C.
ATTORNEYS AT LAW
P. O. BOX 6688
36 MERCHANTS ROW
UTLAND, VERMONT 05702

Congress has constantly authorized the federal courts to exercise jurisdiction based on the diverse citizenship of parties. In *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806), this Court construed the original Judiciary Act's diversity provision to require complete diversity of citizenship. *Id.*, at 267. We have adhered to that statutory interpretation ever since. See *Carden v. Arkoma Associates*, 494 U.S. 185, 187, 110 S.Ct. 1015, 1017, 108 L.Ed.2d 157 (1990). The current general-diversity statute, permitting federal district court jurisdiction over suits for more than \$50,000 "between ... citizens of different States," 28 U.S.C. § 1332(a), thus applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant.

Plaintiff, Scott Traudt, alleges that he is a resident of Stratford, Vermont; however, he fails to allege that he is a citizen of any state. The burden is on the plaintiff to allege sufficient facts from which jurisdiction clearly appears. *Lumbermens Mut. Cas. Co. v. Chase Manhattan Bank*, 2001 WL 103547, (S.D.N.Y.) (S.D.N.Y.,2001); *Onebeacon Ins. v. River House, Inc.*, 2002 WL 31507721, (S.D.N.Y.) (S.D.N.Y.,2002). The First Amended Complaint fails to meet this standard.

Moreover, plaintiff has failed to properly invoke diversity jurisdiction because plaintiff alleges that the amount in controversy is only in excess of \$50,000.00. Diversity of citizenship jurisdiction must affirmatively appear in the complaint or the record; it cannot be presumed and the requirement of 28 U.S.C § 1332 (a) is clearly not met by the allegations of ¶ 10 of the complaint.

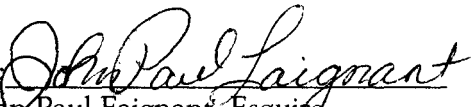
The First Amended Complaint does not allege the citizenship of the plaintiff or David Cicotte. However, in ¶¶ 3 and 7 of the First Amended Complaint, plaintiff alleges that Performance Marketing, Inc. is a Vermont corporation. Because the only facts alleged in the complaint fail to clearly demonstrate that plaintiff and Performance Marketing, Inc. and David Cicotte are citizens of diverse states and the amount in controversy satisfies the threshold amount, it is clear that plaintiff has utterly failed to adequately allege complete diversity and the proper jurisdictional threshold of damages.

It is firmly established that diversity of citizenship " 'should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record.' " *Wolfe v. Hartford Life & Annuity Ins. Co.*, 148 U.S. 389, 13 S.Ct. 602, 37 L.Ed. 493 (1893). It is also clear that a statement of the parties' residence is insufficient to establish their citizenship. *Id.*; *John Birch Soc'y v. National Broadcasting Co.*, 377 F.2d 194, 199 (2d Cir.1967). *Leveraged Leasing Admin. Corp. v. PacificCorp Capital, Inc.*, 87 F.3d 44, *47 (C.A.2 (N.Y.),1996).

WHEREFORE, the moving defendants move that the First Amended Complaint against them be dismissed.

Dated at Rutland, Vermont this 19th day of August, 2004

PERFORMANCE MARKETING, INC.
DAVID CICOTTE

By 
John Paul Fagnant, Esquire
Miller Fagnant & Behrens, P.C.
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Defendants

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Docket No: 1:04-CV-53

CERTIFICATE OF SERVICE

NOW COME Defendants Performance Marketing, Inc., and David Cicotte, by and through their attorneys, Miller, Fagnant & Behrens, P.C., and pursuant to V.R.C.P. 5(d) certifies that on August 19, 2004, Defendants' Motion to Dismiss Complaint was served upon:

Scott Traudt, Pro Se Plaintiff
191 Kibling Hill Road
Strafford, VT 05072

William H. Quinn, Esq.
Pierson, Wadhams, Quinn, Yates & Coffrin
253 South Union Street
Burlington, VT 05401-4592

by forwarding a copy to them via U.S. Mail, postage prepaid.

DATED at the City of Rutland, County of Rutland, and State of Vermont this ____ day of August, 2004.

MILLER, FAIGNANT & BEHRENS, P.C.

By: 

John Paul Fagnant, Esquire
Attorney for Defendants
Performance Marketing, Inc. and
David Cicotte